and to the consuming public, we submit the following points:

II.

SUMMARY OF ARGUMENT.

A. The record herein proves the absence of any monopoly by the defendant companies in the buying of livestock, or in the sale of the products thereof.

B. The record herein discloses the improbability, if not indeed, the impossibility of any food monopoly by the defendant companies.

C. The record herein discloses that the distributive facilities, equipment, and organizations of the defendant companies can be employed more efficiently and economically if utilized for the distribution of food products in addition to meats and meat food products.

III.

ARGUMENT.

A. The Record Herein Proves the Absence of any Monopoly by the Defendant Companies in the Buying of Live Stock, or in the Sale of the Products Thereof.

In the bill of complaint filed herein in 1920, it was specifically charged that the defendant packing companies had achieved a monopoly in the meat packing business (R. 17). In 1930, the Court below stated, after hearing the sworn testimony of a great number of witnesses consisting of livestock producers,

livestock commission men, order buyers, officials of the Packers and Stockyards Administration of the Department of Agriculture, many competitors engaged in the meat packing business, and others:

> "It is conceded that there is today no monopoly in the meat packing industry. The parties have stipulated:
>
> > 'That the individuals, firms and corporations, engaged in the meat packing business in the United States, to the number shown or which may be shown by evidence in this case, owned and controlled independently of each other, are in active competition with each other in the purchase of livestock and in the sales of their products in the various geographical localities and districts within the United States in which they respectively purchase and sell.' (R. 1043.)
>
> * * * * * * * *
>
> "The testimony is uncontradicted that the four present groups of defendants are independently owned and controlled and are in active competition in the purchase and sale of livestock and the sale of meat products. (R. 1044.)
>
> * * * * * * *
>
> But in the instant case no one of the defendant groups has anything like a control of the business. The business of each is far less than that of its combined competitors. The great weight of the testimony is that no combination or agreement in restraint of trade exists between them." (R. 1050.)

The above statements, from the opinion of the Court below, are based upon definite positive findings of fact, amply supported by the evidence in the

record. In such evidence appears the testimony, (oral or by stipulation), of *ninety-five livestock producers,* who are thoroughly familiar with conditions as they actually exist in the marketing of livestock. *These witnesses are the leaders of the livestock industry in the United States.* Practically all of them are officers, directors, or representatives of various National and State livestock organizations. Among such witnesses were the following:

J. Elmer Brock, Pres., Wyoming Stockgrowers' Association, Buffalo, Wyoming; R. W. Brown, Missouri Farm Bureau Federation; Dan D. Casement, Manhattan, Kansas; Kenneth Chalmers, Colorado Wool Growers Assn; James Cook, Northwestern Co-op. L. S. Shippers' Association, Clearwater, Minn.; J. M. Coyner, Secretary, Winconsin Livestock & Meat Improvement Council, Chairman, Committee of National Swine Growers' Assn. on Register of Performance for Swine, Madison, Wisconsin; E. L. Dana, Parkman, Wyoming; B. F. Davis, Colorado Stockgrowers Assn., Pres., Colorado Farm Bureau, Past Secty., Wyoming Stockgrowers, Denver, Colorado; Dr. George M. Babcock, Rock Island, Illinois; A. E. De Ricqles, Denver, Colorado; T. J. Drumheller, Washington Wool Growers' Assn.; W. I. Drummond, American Farm Congress, Kansas City, Mo.; Earl Elijah, Eastern Iowa L. S. Marketing Association; Knute Espe, Iowa Cooperative Live Stock Shippers Assn.; H. W. Farr, Pres., Nebraska-Colorado Lamb Feeders Assn., Greeley, Colorado; Dr. I. L. Gotthelf, Pres., Saguache Lamb Feeders' Assn., Saguache, Colorado; Robert Graham, Pres., Nebraska Stockgrowers' Assn., Alliance, Neb.; Mac Hall, Denver, Colorado; F. W. Harding, Gen. Executive, Ameri-

can Shorthorn Breeders Assn., Chicago, Ill.; Mr. Harris, Coop. Auction Yards, Ky.; Dan Hildebrand, Nebraska Improved Live Stock Breeders Assn., and Nebraska Cattle Feeders Assn.; Harry Hopley, Pres.; Interstate Organization of Meat Producers, Atlantic, Ia.; Professor E. H. Hostetler, No. Carolina Agricultural College, Secty, Southern Livestock Association, Raleigh, N. C.; J. W. Hudelson, Pomona Kansas; A. A. Johns (Senator), Arizona Wool Growers' Association, Prescott, Ariz.; Ben Kemper, Denver, Colo.; R. M. Kleberg, Corpus Christi, Texas; R. P. Lamont, Jr., Pres., American Hereford Breeders Assn., Pres., Western Packing Company at Denver, Larkspur, Colo.; Fred F. McArthur, Oakland, Iowa; S. W. McClure, Idaho Wool Growers' Assn.; Ray McElrath, Melville, Iowa; Arden McKee, Pres., National Swine Growers' Assn., Preston, Iowa; Sol Mayer, Member, Sheep & Goat Raisers' Assn., San Angelo, Texas; Jewell Mayes, Secty, Missouri State Board of Agriculture, Jefferson City, Mo.; A. R. Mitchell, Former Pres., American Hereford Cattle Breeders' Assn., Member, New Mexico Stockgrowers, Albert, N. M.; P. C. Murphy, Co-op. Wool Growers Assn. of S. Dakota; Floyd Nichols, Capper Pres, Topeka, Kansas; E. A. O'Neil, President, Alabama Farm Bureau Federation; L. B. Palmer, Ohio Farm Bureau Federation; E. A. Phillips, Secty, Montana Stockgrowers' Assn., Helena, Mont.; F. A. Phillips, Cattle & Horse Raisers Assn. of Oregon; E. C. Rector, Ohio Livestock Co-op. Assn., Circleville, O.; Roscoe Rich, Idaho Wool Growers' Assn.; James A. Riggs, Sullivan, Indiana; C. C. Roberts, Marion, O.; Colonel George Grant Seamon, Taylorville, Ill.; J. B. Wilson, National Wool Growers' Assn., Wyoming Wool Growers' Association, McKinley, Wyo.; W. H. Settle, Indiana Farm Bureau

Federation; J. Blaine Shaum, Tarkio, Mo.; Harry Snyder, Billings, Mont.; E. B. Spiller, Secty, Texas & Southwestern Cattle Raisers Assn., Fort Worth, Texas; Sam G. Thompson, Center Junction, Iowa; Dan Wallace, Editor, The Farmer, St. Paul, Minn.; Senator Nate C. Warren, Member, Nebraska-Colorado Lamb Feeders' Assn., Fort Collins, Colo.; C. R. White, American Farm Bureau Federation; J. D. Yaeger, Nevada State Farm Bureau Federation; James West, V. P., Texas & Southwestern Cattle Raisers Association, Houston, Texas; Hubbard Russell, Former President, California Cattlemen's Association, Former President, Western Marketing Association, Los Angeles, Calif.; Senator C. H. Williams, Pres., Montana Wool Growers Assn., Deer Lodge, Mont.; Charles D. Carey, Chairman, National Live Stock and Meat Board, Cheyenne, Wyo.; Senator Frank O. Horton, Former Vice-Pres., Wyoming Stock Growers Assn., Buffalo, Wyo.; Charles Belden, Director, American National Live Stock Assn., Pitchford, Wyo.; Field S. Bohart, Former Pres., Colorado Stock Growers Assn., Director, American National Live Stock Assn., Colorado Springs, Colo.; J. H. Nason, V. P., Western-South Dakota Stock Growers Assn., Spearfish, S. D.; E. Ray Cowden, V. P., Arizona Stock Growers Assn., Director, American National Live Stock Assn., Phoenix, Ariz.; Harry Saxon, Former Pres., Arizona Stock Growers Assn., Dir., American Natl. Live Stock Assn., Wilcox, Ariz.; Wayne Thornburg, Former Vice-President, Arizona Stock Growers Assn., Director, American National Live Stock Assn., Phoenix, Ariz.; P. S. Dorris, Former Pres., California Cattlemen's Assn.. and of Western Marketing Assn., Alturas, Calif.; Ezra Baer, Director, American National Live Stock Assn., Meeker, Colo.; W. S. Whinnery, Former

President, Colorado Stock Growers Assn., Director, American National Live Stock Assn., Lake City, Colo.; W. J. Miller, Former Pres., Kansas Live Stock Assn., Topeka, Kans.; W. H. Donald, V. P., Montana Stock Growers Assn., Melville, Mont.; J. A. Donovan, Director of Montana Stock Growers Assn., and American National Live Stock Association, Butte, Mont.; J. Terrett, V. P., Montana Stock Growers Assn., Brandenburg, Mont.; Dan Adamson, Former Pres., Nebraska Stock Growers Assn., Director, American National Live Stock Assn., Cody, Neb.; George Cristopher, Director, Nebraska Stock Growers Assn., Valentine, Neb.; Vernon Metcalf, Secty, Nevada Land & Live Stock Assn., Reno, Nevada; E. B. Mitchell, President, Highland Hereford Assn., Marfa, Texas; T. B. Masterson, Director of Texas & Southwestern Cattle Raisers Assn., and of American National Live Stock Assn., Truscott, Texas; R. M. Faddis, Director, Wyoming Stock Growers Assn., Director, American National Live Stock Assn., Sheridan, Wyo.; Caesar Kleberg, Asst. Manager, King Ranch, Director, Texas & Southwestern Cattle Raisers Association, Kingsville, Texas; Ed Springer, Director, New Mexico Stock Growers Assn., Director, American National Live Stock Assn., Springer, N. M.; A. R. Modisett, Director, Nebraska Stockgrowers' Assn., Director, American National Livestock Association, Rushville, Nebraska. (R. 560-64.)

As to these witnesses, representing the livestock industry, it was stipulated, that they were available to the petitioning defendants as witnesses and would, if called to the witness stand and sworn, testify in substance:

"That there is keen and active competition in the buying of their livestock; that they, and the members of their respective organizations, are treated fairly, and are not subjected to unfair trade practices, in connection with the selling by them and the buying by representatives of the defendant packers, and other packers and buyers, of their livestock; that they sell their stock, under competitive conditions, in the livestock market yards in the various sections of the country, and directly to packers at their private yards and to buyers engaged in direct marketing near places of production; that based upon their experience in the livestock industry each of said witnesses is of opinion that there is not and cannot be a monopoly of said industry; * * * that based upon the same experience each of said persons is of opinion that his industry would be benefited if the large meat packing companies were permitted to sell foodstuffs other than, and in addition to, meat food products, to the end that the cost of distributing meats and other livestock products might be shared by non-meat foodstuffs handled and distributed by the same persons, firms and corporations who engaged in the handling, distributing and selling of meats;" (R. 559-60).

The above evidence from livestock producers and their representatives throughout the country stands uncontradicted. We submit it should be conclusive in support of the following findings of fact:

"2. That there now exists in the meat packing industry in the United States active competition among a large number of individuals, firms and corporations, including defendants herein, in the purchase of livestock and in the selling of the products thereof." (R. 1110.)

"7. That none of the defendants has a monopoly in the meat packing industry." (R. 1111.)

In the opening statement of Counsel for the Government, it was conceded that, "the Court has jurisdiction, upon a proper showing, to modify the decree," entered February 27, 1920 (R. 389). At the same time it was stated, the intention of the Government was "to present to the Court every justifiable argument and *fact* which tends to the conclusion that the decree should not be modified." (R. 388.)

Obviously, those engaged in the raising of livestock, and the selling of such livestock, should be most apprehensive of any monopoly, or dangerous probability thereof, in the purchase and sale of the materials upon which they are wholly, or in large part, dependent for a livelihood. No section of the public would be affected as directly, and immediately, by such conditions as would the millions of farmers and ranchers throughout the country. The knowledge which livestock producers have of conditions surrounding the purchase and sale of their animals is not based upon theory, or indeed upon social, political or economic bias, but upon facts gained through experience. The courts have pointed out that trade competitors are the first to feel, and the keenest to condemn, monopolistic conditions in any industry. We insist that no less the producers of the raw materials of the meat packing industry would be the first to feel, and the keenest to condemn, monopolistic conditions in that industry. If facts are available to show the existence of a monopoly, or serious threat of monopoly, in the meat packing industry, they should be forthcoming from those who are vitally concerned in maintaining an open competitive market for their property which must be sold.

The reasoning of the Court in the case of United

States vs. Keystone Watch Case Co., 218 Fed. 502, 517, seems particularly applicable herein. The Court (Circuit Judges Buffington, Hunt and McPherson), in considering the action to be taken where neither the purpose, nor effect, of a course of action had as yet been shown to be definitely unlawful, said:

> "In that event the nature of things compels the court to enter the field of prophecy, or of probable anticipation. In such a situation, nothing else can be done. A court can only deal with the situations that are laid before it, and in the case supposed it must avail itself of whatever light may be had, and must exercise its best judgment with such aid as may be at hand. But if the suit be deferred until the lapse of time and the actual effect of the conduct complained of have permitted facts to accumulate and have tried the project in question by the test of experience, we can hardly doubt that prophecy or probable anticipation should be considered inferior in force to the evidence of what has actually taken place. In this world we must do our best with the means at our disposal. Even if prophets are always in danger of being discredited by the event, we are sometimes compelled to speculate about the future; and our duty then is to check our speculations as much as possible by taking account of such probabilities as may arise from past experience and observation. *In like manner, when we are face to face with what has actually happened, we may safely lay prophecy aside, in order to accept the services of a better guide, one that can be relied upon with a firmer confidence.*" (Italics ours.)

As a result of the trial herein, the Court below was no longer compelled "to enter the field of

prophecy, or probable anticipation,"—to base a decree upon fear of a future wrong,—to construe pleadings, denied or undenied. Evidence was presented under oath. Witnesses qualified by knowledge, and experience, testified as to conditions which actually prevailed in the marketing of livestock and sale of products thereof. Their evidence is as to facts which prove competition, and negative the allegations of the petition charging defendants with monopolistic control.

As this Court said in International Shoe Co. vs. Federal Trade Commission, 280 U. S. 291:

> "The existence of competition is a fact disclosed by observation rather than by the processes of logic;"

Attention is again called to the statement of the Court below that: *"The testimony is uncontradicted,* that the four present groups of defendants are independently owned and controlled, and are in active competition in the purchase and sale of livestock and the sale of meat products;" (R. 1044), and that, —"It is conceded that there is today no monopoly in the meat packing industry." (R. 1043.)

With the above statements as to existing competitive conditions fully supported by the record herein; with the prompt and nation wide dissemination by the Department of Agriculture of information to livestock producers, both as to livestock receipts and prices; with the supervision and regulation of seventy-two posted public livestock markets throughout the country, where 4461 registered market dealers and agencies (R. 408), handle the producers' livestock at rates and charges fixed and determined by the Secretary of Agriculture; with

packers' buying and selling transactions and practices supervised and controlled by the Secretary of Agriculture under the Packers and Stockyards Act, 1921; with producers cooperative sales agencies handling on these livestock markets a dollar volume of sales of livestock amounting to $302,894,984 in 1929 (R. 403);—we submit, the record conclusively disproves any charge of the existence, or dangerous probability, of a monopoly in the purchase of livestock.

B. The Record Herein Discloses the Improbability, if Not Indeed, the Impossibility of Any Food Monopoly by the Defendant Companies.

The term "monopoly" according to its legal meaning is defined as follows:

> "For one competitor to exclude all or substantially all other competitors from such opportunity,—*i. e.* drive them from the field of freely offering their goods, so as to have that field to himself—is to monopolize according to the legal and accurate sense of the word." * * *
> "It is never to be lost sight of that actually doing business, no matter how large, is not monopolizing. *It is excluding from the opportunity of doing business that is.*" Paterson vs. United States, 222 Fed. Rep. (Sixth Circuit) 599, 621, 625 (Italics ours).

The facts in the record completely disprove the existence of power in these defendant companies to exclude others from the production, manufacture, transportation, or distribution of foods.

As to production: In 1925 there were in the United States 6,371,640 farms (Pet. Ex. 31); in that year the gross income to farmers from crops

and animal products amounted to $12,051,520,000., and the cash income amounted to $10,160,415,000. (Pet. Ex. 32.) To mention only a few of these items, and consider at the same time the millions of people engaged in producing them, the vast areas of their production, the stupendous financial and other problems involved in the planting, growing, harvesting and marketing of these crops, is to show the utter absurdity of any fear of monopoly *in food production.* For example the estimated gross income from farm production in the United States for the years 1924-1928 was as follows upon the items mentioned below:

	1924	1925	1926	1927	1928
CROPS	(Value in thousands of dollars: *i. e.*, 000 omitted)				
Wheat	925,383	804,175	861,799	875,486	764,621
Rice	41,698	45,231	42,395	40,558	35,844
Potatoes, white	257,868	430,685	409,185	382,890	234,380
Sweet Potatoes	79,644	101,212	96,239	100,817	86,730
Truck crops	302,671	346,833	287,597	308,231	326,926
Peanuts	39,883	35,732	29,304	42,015	34,435
Apples	198,644	207,785	199,066	168,929	193,189
Peaches	65,713	62,506	64,667	49,164	60,253
Pears	25,888	28,196	21,508	23,569	23,503
Grapes	69,134	65,299	63,621	64,493	48,160
Cranberries	5,485	6,370	5,623	6,089	7,743
Strawberries	53,859	50,512	58,373	59,179	53,711
Other berries	28,109	28,311	32,615	36,857	31,881
Pecans	4,649	7,030	9,772	4,592	4,030
Oranges	91,338	89,864	104,082	118,313	142,285
Grapefruit	7,620	16,855	11,146	19,456	18,901
Other fruits	64,510	63,283	78,816	74,468	81,466
Other nuts	12,942	19,080	12,450	20,958	15,818
Maple syrup and sugar	9,283	7,629	9,802	9,166	7,526
Sugar beets	59,524	47,137	54,964	59,455	50,960
Sugar cane and syrup	24,341	29,525	20,376	19,855	20,786
Farm gardens	295,379	301,583	284,349	266,082	303,651
ANIMAL PRODUCTS					
Cattle and calves	921,682	1,002,954	1,010,030	1,005,770	1,124,474
Hogs	1,323,975	1,666,402	1,757,626	1,506,949	1,477,721
Sheep and lambs	133,966	152,612	155,876	150,962	171,463
Poultry (chickens)	390,991	408,088	445,631	449,314	457,464
Eggs	583,562	691,897	704,037	639,868	717,103
Milk	1,677,561	1,758,841	1,804,605	1,910,545	1,965,358

(Pet. Ex. 32, p. 373.)

It is a matter of common knowledge that the supplies, and stabilization of the prices, of coffee in Brazil, of sugar in Cuba, and various farm crops in the United States, have presented insuperable problems even where Governments have come to the financial aid of those engaged in production and marketing. These basic facts as to the production of foods must be given consideration in weighing the possibility of any monopoly in foods.

As to manufacture: The Census of Manufactures of the Department of Commerce for 1927, shows 49,787 separate establishments engaged in the manufacture of foods,—and these Census figures only include establishments producing foods having a factory value of $5,000. per annum, or more. (Pet. Ex. 1.) These establishments employed 679,520 wage earners; wages amounted to $823,388,000.; cost of materials $8,113,433,000. and value of products $11,015,860,000. Of such establishments, 33,244 were engaged in the manufacture of vegetable products having a total value of $6,210,130,000. (Pet. Ex. 1.) These figures relate only to wholesale values at point of manufacture, and do not include any part of the vast quantities of foods prepared in the homes such as canned fruits and vegetables, butter, cheese, and meats from farm slaughtered animals; and foods not requiring such preparation, as milk, eggs, fresh vegetables, and fruits.

It was stipulated (R. 574), that statistics available as to 241 companies in the food or food products industry show that in 1929 such companies had a net income of $445,061,209; that 134 of these companies reported their wholesale and retail sales volume for that year, and such sales amounted to

$6,210,736,048; and it may be noted, that while these figures as to net income and sales include the defendant companies, the combined net income of the latter amounted to less than 6¼ per cent of the total net income of the 241 food companies reporting; and further that these reports cover only 241 food manufacturers out of a total of 49,787 separate establishments engaged in the manufacture of foods.

In the findings of fact by the Court, it is stated:

> "11. That during the ten years, 1920 to 1930, food manufacturing and distributing concerns, other than defendants, have greatly grown in volume of business, financial strength, and earning power; that there has been a marked growth (a) in the integration of concerns dealing in various lines of foods into single manufacturing, selling and distributing organizations; (b) in the integration by food concerns in the handling of products from manufacturers to consumers; and (c) in the diversification of products handled by manufacturers, wholesalers and retailers; and the trend is toward further integration and diversification." (R. 1112.)

As to transportation: The utter impossibility of these defendants monopolizing the means of food transportation appears obvious. The railroad companies with all their trackage, facilities, equipment, and experience in transportation, are waging even now a losing battle to maintain their position against the thousands of motor truck lines covering the country. As pointed out in the record, surfaced roads in the United States have increased from 387,457 miles in 1921, to 662,435 miles in 1929.

Roads surfaced with concrete, asphalt, macadam, and similar materials have increased from 36,038 miles in 1921 to 112,454 miles in 1929. (R. 418.) The number of trucks in use in the United States increased from 979,904 in 1921, to 3,379,854, in 1929 (R. 418), and the number of freight refrigerator cars owned or controlled by railroads and private car companies increased greatly from 1920 to 1930. (Pet. Ex. 77.) Further, it was stipulated:

> "With reference to Petitioners' Exhibits 76 and 77, relating to refrigerator car equipment, it was stipulated that the supply of refrigerator cars in the United States, whether owned by the defendants or other meat packers, private car companies, or common carriers, is adequate to afford an ample supply of refrigerator cars at any time to any who need them and are in a position to use them." (R. 608.)

In the findings of fact by the Court it is stated:

> "17. That during the past ten years, (a) the increase in the number of railroad refrigerator cars, not owned by the defendants, available to all who need to use such equipment in their businesses, has resulted in there now being ample equipment of that character for any and all who need them; (b) the increase in the use of motor trucks for the transportation of food products and the extending of the areas of their operation by reason that the great increase i good roads, and the increase in the transporting by motor trucks of products by packers competing with defendants and by wholesale grocers in making deliveries to their customers, have combined to deprive defendants of any advantage which the ownership of refrigerator

cars formerly gave them, and none of the defendants enjoys any undue preference or advantage by reason of its ownership of refrigerator cars." (R. 1113.)

As to distribution: According to the best estimates available the total 1928 retail food bill of the United States was Twenty Four Billion Dollars, of which about Three Billion Dollars is the estimated value of products consumed at the place of production.

Among other sales outlets for foods there are at least 375,000 retail food stores (R. 773) excluding regular chain stores, and approximately 6,000 wholesale grocers located in 2,300 different cities. (Pet. Ex. 88.) It was stipulated that in 1920 there were 15,000 regular chain grocery stores in the United States having sales in that year of $770,000,000., and that by 1929 the number of stores had increased to 60,000 with sales of $3,500,000,000. (R. 567.) These 60,000 chain stores are operated by 900 separate corporations and the 70 largest of these corporations own 48,699 stores. (R. 567.) Further the record shows the existence of 551 voluntary chain grocery organizations with a total membership of 59,640 separate retail stores. (R. 510.)

It was strongly urged by all witnesses from the livestock industry, most of whom were officers of the great livestock associations of the country, that the Decree herein be modified so as to permit the defendant companies to retail meats and other food products. Such permission was denied and the injunctions of the Decree prohibit such action. It would appear unnecessary therefore to argue the possibility of any danger of a food monopoly by

these defendants through control of retail food distributive outlets.

The finding of fact by the Court below upon the change in conditions in the food industry since 1920, is as follows:

> "12. That since 1920 conditions have materially changed in the methods of marketing food products by reason of (a) a great increase in the number of regularly organized retail chain food store companies; (b) the grouping together for cooperative and concerted action of large numbers of wholesale and retail food establishments in what are called voluntary chains; (c) an increasing number of combination food wholesaling and retailing establishments with the resulting reduction in such single line establishments as grocery stores, vegetable and fruit stores, and meat markets; (d) the combining with grocery establishments of departments or markets for the selling of meats; and (e) the engaging by concerns retailing foods on large scale in the functions usual to wholesale and branch house distribution, and in the functions of manufacturing and processing meat products and other foods." (R. 1112.)

And the ultimate finding of fact by the Court below upon a review of the testimony of the witnesses and other evidence is:

> "13. That if defendants were to engage in handling food products additional to products they are now dealing in, there is no probability that they could or would acquire a monopoly of, or control the quantity and prices of, the foods produced and/or consumed in the United States." (R. 1112.)

Bearing in mind "the legal and accurate sense of the word monopolizing" (Patterson vs. United States, *supra*), we submit the facts in the record herein show conclusively the improbability, if not indeed the impossibility, of the defendants securing a monopoly either in producing, manufacturing, transporting, or distributing food products; that the fear of any future monopolistic control in any of these respects by the defendants herein is not based upon existing facts and conditions.

C. The Record Herein Proves that the Distributive Facilities, Equipment, and Organization of the Different Companies Can be Employed More Efficiently and Economically if Utilized for the Distribution of Food Products in Addition to Meats and Meat Food Products.

In the Statement of Evidence (R. 476), it is conceded that the following named witnesses testified as to conditons in the livestock industry over the past eight or ten years and,

> "That the existing conditions would be alleviated and livestock producers benefited if the large meat packers were permitted to handle at wholesale other food products in addition to meats, so that meat alone would not have to bear the entire cost of distribution." (R. 477.)

The witnesses, whose testimony, in part, was thus summarized, were as follows:

F. E. MOLLIN, Secretary, American National Livestock Association, Denver, Colorado. (R. 476.)

WAYLAND MAGEE, President of the County Farm

Bureau in Nebraska; President of the Nebraska Crop Growers Association; Director of the Federal Reserve Bank at Kansas City; Member of the Executive Board Nebraska Dairy Development Society; and Manager of a 1,280 Acre farm owned by his family, located near Bennington, Nebraska. (R. 478.)

WILLIAM H. TOMHAVE, Executive Secretary, American Aberdeen Angus Breeders' Association, author of "Meat and Meat Products", former professor of Animal Husbandry at Pennsylvania State College 1912-1925, and member of the National Livestock and Meat Board since 1926. (R. 479.)

MURDO MACKENZIE, Manager, Matador Land and Cattle Company, Ltd., which Company is engaged in the cattle business, operating ranches in Texas and Montana aggregating about 1,097,000 acres; owning approximately 54,000 cattle and 10,000 sheep; Mr. MacKenzie was for two years President of the Texas & Southwestern Cattle Raisers' Association, and is now an ex-officio member of its Board. (R. 480.)

J. F. WALKER, Secretary and Field Manager, Ohio Wool Growers Cooperative Association, Gambier, Ohio, an organization comprising about 8,000 sheep men in Ohio, Michigan and Indiana, and owning among them about 500,000 head of sheep; this Association handled about four million pounds of wool annually direct to the mills and is affiliated with the Ohio Livestock Shippers Association. (R. 480.)

W. F. RENK, Commissioner of Agriculture for the State of Wisconsin, Madison, Wisconsin; formerly President of the American Shropshire Associ-

ation, American Hampshire Sheep Association, Wisconsin Livestock Breeders Association, and now President of the Wisconsin Breeders and Sheep Feeders Association. (R. 481.)

JAMES TOD, Maple Hill, Kansas, owner of a four thousand acre ranch in Kansas, and a seventy thousand acre ranch in New Mexico, where he carries on the business of breeding and feeding livestock, marketing about fifteen hundred head annually. (R. 482.)

R. N. GUNN, Buckingham, Iowa, livestock farmer with about fifteen hundred acres of land in central Iowa; Chairman of the National Board on Swine Production Policy; Member of the Livestock Committee of the Federal Farm Board; Director of the Farm Bureau Federation in Iowa. (R. 484.)

W. J. FITTS, Gallatin, Tennessee, livestock farmer and President of the American Duroc Jersey Association; Director of the National Swine Growers Association. (R. 485.)

JAMES A. HOOPER, Salt Lake City, Utah, Secretary of the Utah Wool Growers Association and Manager of Austin Brothers Association, which concern handles about 25,000 sheep and 2,500 cattle on approximately 44,000 acres of grazing land and markets annually 10,000 to 15,000 sheep and 1,500 head of cattle. (R. 485.)

J. H. MERCER, Topeka, Kansas, Livestock Sanitary Commissioner of the State of Kansas; Secretary and General Manager of the Kansas Livestock Association; President of the National Livestock show at Wichita; Director of the American Royal Livestock show in Kansas City, Director of the National Livestock and Meat Board. Kansas Live-

stock Association embracing about 11,500 members who own approximately 80 per cent of the beef animal population and 65 per cent of the hogs and sheep in the State of Kansas. (R. 487.)

WINCHESTER P. WING, Secretary of the California Wool Growers Association, San Francisco, California. (R. 488.)

The defendant packing companies use refrigerator route cars in handling their perishable meats and meat food products. To obtain route car movement they must pay in certain territories a *minimum revenue on each car* equal to a minimum weight (usually 10,000 or 12,000 pounds) at L. C. L. rates for the distance covered. The record herein shows that the route cars used by the defendant companies in shipping their meats and perishable products are sent out, frequently, without sufficient load to make up the minimum weight; that consequently a penalty sufficient to make up the deficit must be borne by the meats and meat food products; that while freight charges at L. C. L. rates would have to be paid on grocery articles loaded in the route cars with the meats, the amount of such charges would reduce (by the amount thereof), the penalty now borne by the meats alone. The amount of freight paid on such grocery articles by the packer would be the same as the amount paid by a wholesale grocer.

Nevertheless, it is argued that it would not be *in the public interest* to remove the penalty charge freight burden, *borne by meat shipments alone,* and have such charge applied pro rata against grocery products occupying the unfilled space in the car.

That section of the public interest consisting of the livestock producers, is opposed to any such

wasteful handicap against distribution of livestock products, and insists that every handicap against the most economical marketing of either their animals or the products thereof should be promptly removed; that such action is necessary not only in their interest as producers but in the interest of the great consuming public. Those opposed urge that the Government not only countenance waste in distribution but insist upon its continuation. As was said by the Court below:

> "As to the peddler cars it is an extreme measure, unless absolutely necessary, to prevent anyone from making an economic use of his facilities. The use by the packers of vacant places in the peddler cars and in their warehouses, not used for meats, by other commodities is sound as an economic and business proposition." (R. 1057-58.)

The lack of opportunity or ability on the part of wholesale grocers to utilize refrigertor route cars in making shipments of grocery articles, is not an argument against affording packers full opportunity to do so where, as here, it is conceded that the supply of such cars is ample.

We repeat, the record shows (Petitioner's Exhibit 77), that the number of refrigerator cars owned by carriers and private car companies has greatly increased since 1920, and it was stipulated (R. 608), with reference to refrigerator cars, as follows:

> "That the supply of refrigerator cars in the United States, whether owned by the defendants or other meat packers, private car com-

panies, or common carriers, is adequate to afford an ample supply of refrigerator cars at any time to any who need them and are in a position to use them."

Obviously there can be no element of monopoly control as a result of the ownership or leasing of refrigerator cars by defendant companies, where the supply of such cars for use by others is ample, and refrigerator car service is available to all.

It cannot be denied that no unlawful transportation preferences or advantages accrue to the defendant packing companies, as shippers, through carriers permitting them to load meats and groceries in the same car.

In July, 1919, the National Wholesale Grocers' Association of the United States and the Southern Wholesale Grocers' Association, (now American Wholesale Grocers Association), filed complaints with the Interstate Commerce Commission wherein the Director General of railroads as Agent for various carriers was made respondent. In such complaints, Interveners herein demanded that respondent packing companies be forbidden to ship, in route cars, commodities which were not the products of slaughtered animals. In its decision upon such complaints, after extensive hearings, the Interstate Commerce Commission decided, under date of June 22nd, 1921, that:

"The complainants did not demand the discontinuance of the packers, peddlers, or branch house cars, but asked that the packers be forbidden to ship in such cars, commodities which are not the products of slaughtered animals. This demand, they say upon their brief, is the

issue between the packers and the wholesale grocers in this controversy, stated in one sentence."

* * * * * * * *

"Upon consideration of all the facts of record we find that the practices of defendants (railroad companies) in permitting the meat packers to load certain articles of groceries in their peddler and branch house cars is not shown to result in undue prejudice to complainants or unduly to prefer the packers." (62 I. C. C. Rep. 375.)

Further, the record shows that refrigerator route cars do not move either more rapidly or frequently than non-refrigertor cars; that such route cars operate on the regular published schedule of local freight trains on the lines of the carrier where used. (R. 675.)

Insofar as the exclusion of the defendant packing companies from handling grocery articles is based upon fear of monopoly arising from defendants ownership or use of refrigerator car transportation, the record herein conclusively establishes:

1. The supply of refrigerator cars is ample at all times to all who need them or can use them;
2. The authority of the Interstate Commerce Commission to regulate the use of such cars cannot be questioned;
3. The Interstate Commerce Commission has found, since the Decree herein was entered, that the defendant companies did not enjoy any undue proference through loading certain articles of groceries in their route cars along with meats;
4. No expedited movement is accorded such cars.

Surely it is not the policy of the Anti-Trust Laws to restrict competition through discrimination, and place upon one set of shippers a burden of unnecessary transportation expense which must be ultimately transmitted to the consumer of the manufactured product, or borne by the producer of the raw materials from which the product is manufactured.

The interests of the hundreds of thousands of livestock producers, and of the millions of consumers of meats require distribution from producer to consumer at the least cost. The theory is wholly unsound that a packer should not be allowed to fill unused space in a refrigerator car with grocery articles simply upon the ground that some competitor is not in a position to load and ship similar cars. And yet such is the theory of the Intervenors despite proof that a full supply of refrigerator cars is available to them, that the use thereof for hauling both meats and groceries in the same car is lawful, and that the movement thereof is no more rapid or frequent than the movement of other freight cars used by wholesale grocers in making less than car load shipments. We believe that, "jurisdiction of a court of equity is remedial, not punitive" (United States vs. American Can Company, 234 Fed. 1019), and the decision of the Court below upon this point will meet with full approval in this Court. We call attention particularly to the following findings of fact by the lower Court:

> "9. That each of the defendants could materially reduce the cost of distributing meats and other livestock products if it engaged in selling, dealing in and transporting foodstuffs other

than, and in addition to, meat food products." (R. 1111.)

"10. That each of the defendants, by dealing in foodstuffs other than, and in addition to, meat food products, would be enabled to so distribute its overhead and sales costs as to effect economies in the distribution of both meats and other livestock products and of non-meat-food products." (R. 1111.)

Neither of these findings of fact is questioned in any manner, by any of the Appellants, either in their Assignments of Error, or in their Statements of Points Relied Upon, presented to this Court.

IV.

CONCLUSION.

We therefore respectfully submit that modification of the Decree herein so that the defendant packing companies may utilize completely, and more efficiently, their distributive facilities is in the interests of the public and of benefit to the livestock producers of the country, and the order of the Court below should be affirmed.

Respectfully submitted,

DAYTON MOSES,
Counsel for the Texas and Southwestern Cattle Raisers' Association and the Kansas Livestock Association, as Amicus Curiae.